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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. [redacted] 36

SAMUEL B. SMITH,

Petitioner,

v.

JAMES MANUFACTURING COMPANY and ELMIRA HATCHERIES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE CERTIORARI PETITION OF SMITH IN CASE No. 950.

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H. A. TOULMIN, Jr.,
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RESPONDENTS' BRIEF IN OPPOSITION TO THE CERTIORARI PETITION OF SMITH IN CASE No. 950.

Section I.

The substance of this Reply to this Certiorari Petition is:

(a) There is no conflict of opinion as between the opinion and conclusion of the Circuit Court of Appeals for the Second Circuit and the opinions and dispositions of the two Courts of Appeals in earlier cases where the Hastings prior use was attempted to be proved.

(b) The absence of conflict of opinion is due to the fact that each opinion or action in the earlier cases was based on a different record and a different measure of proof as to the Hastings prior use, than were present and controlling in respondents' case before the Second C. C. A. There the proof of this prior use (before the Court of Appeals for the Second Circuit) was the first and only instance in which the proof was complete, definite and satisfying; and fulfilled the full measure required by law to sustain such defense.

(c) That this high Court has, in the three instances cited below, denied the writ of certiorari where the record in the case sought to be brought before this Court was different in its proof of a vital and controlling defense, from that in the records in the cases relied upon to show conflict of opinion. For this precedent, which is illustrative, see:

1. *Rubber Tire Wheel Co., et al,* Petitioners, v. *Goodyear Tire & Rubber Co., et al,* Respondents, 187 U. S. 641.

This first certiorari petition was denied. It involved these decisions:

Rubber Tire Wheel Co. v. Columbia Pneumatic Wagon Wheel Co., 91 F. 978, and

Consolidated Rubber Tire Co. (successor to *Rubber Tire Wheel Co.*) *et al v. Finley Rubber Tire Co. et al;* 106 F. 175,

on the one part, and on the other part:

Goodyear Tire & Rubber Co. et al v. Rubber Tire Wheel Co. et al, 116 F. 363, by the Sixth C. C. A., Judge Lurton (later Mr. Justice Lurton), Judge Day (later Mr. Justice Day) and Judge Severens. Decided May 6, 1902.

In the latter case the records and essential issues were different.

2. *Rubber Tire Wheel Co. et al,* Petitioners, *v. Goodyear Tire & Rubber Co. et al,* Respondents, 214 U. S. 512.

This second ceriorari petition was denied. It involved these two cases:

Consolidated Rubber Tire Co. (successor to the *Rubber Tire Wheel Co.*) *v. Diamond Rubber Co.,* 157 F. 677, by the Second C. C. A., on the one part, and

Goodyear Tire & Rubber Co. v. The Rubber Tire Wheel Co., 116 F. 363 (Sixth C. C. A.) on the other part.

3. *Rubber Tire Wheel Co. et al,* Petitioners, *v. Goodyear Tire & Rubber Co. et al,* Respondents, 223 U. S. 724.

This third certiorari petition was denied. It involved these two decisions:

Diamond Rubber Co. v. Consolidated Rubber Tire Co. (successor to *Rubber Tire Wheel Co.*) *by this Court* reported in 220 U. S. 428, on the one part; and

Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., by the Sixth C. C. A., reported in 116 F. 363, on the other part.

All these denied certiorari petitions were based on the ground of alleged conflict of opinions arising from material differences in the record proofs in the respective cases.

And may we say also that this defense of prior use by Milo Hastings was not in the records heretofore before this Court in the cases of Smith v. Snow, 294 U. S. 1, and of Waxham v. Smith, 294 U. S. 20.

Our position is that the denial of this present certiorari petition would be in accordance with the pronounced precedents furnished in the Rubber Tire cases. There this Court three times denied certiorari petitions where the proof in the case sought to be brought up was essentially and controllingly different from that in each case in which the petition was filed.

Such is the definite situation in this instant case.

The records and proofs in the Goodyear case decided by Judges Lurton, Day and Severens were:

Different in fact and legal effect, and consequently in result, from the records and proofs in the decisions set up in each and all of said certiorari petitions. And hence the Writs of Certiorari were denied.

For instance, in the Columbia case (91 F. 978), Judge Thomas attributed to the Grant patented tire a certain operation:

> "A rubber held in the channel by a longitudinal wire, so firmly that it may not escape, yet so freely that it may have the same lateral play through its whole extent." (P. 987.)

While in the Goodyear case (116 F. 363) Judge Lurton, Judge Day and Judge Severens, on the record in that case, found that:

> "This new capacity claimed for Grant's structure is a supposed capacity of his rubber for lateral movement." (P. 373.)
>
> "It is very plain that the degree, if not the very existence, of this capacity for 'side tipping,' depends upon the tension of the retaining wires." (P. 374.)
>
> "But if the retaining wires were tightened to their full tension when their ends were welded or otherwise united, their capacity 'to rise or yield to the excessive strain applied to the rubber' is not shown to exist." (P. 375.)

But this Court found that in this Goodyear case the record and testimony as to the invalidity of the patent were different from the record and testimony in *Diamond Rubber Co. v. Consolidated Tire Co.* (successor to *Rubber Tire Wheel Co.*) reported in 220 U. S. 428. At page 430, this Court said:

"We may say at the outset of this asserted *conflict** between the cases that the Court of Appeals for the Second Circuit considered that there was no antagonism between its decision and that of the Court of Appeals for the Sixth Circuit. It proceeded, as it in effect said, upon *'new facts and features which have been added to or developed from the records in the earlier cases.*" (P. 430.)

And this Court further said:

"The respondents, the Tire Company, contend that the tire is at once firm and mobile in its channel, 'creeps' (moves slowly around the edge of the rim), and will yield laterally, and thus the lateral blows against it will be cushioned. It is further contended that if the tire be 'tipped from its seat in the channel by a side blow' it 'automatically restores itself to normal position when the side pressure is released'." (P. 433.)

"This tipping capacity is made the pivot of the controversy. *It was as to that that the Court of Appeals for the Sixth and Second Circuits disagreed either upon the difference of the testimony in the cases, or more deeply, on principle.*" (P. 434.)

Conclusions Arising from the Above

1. Thus it will be seen that this Court denied all of these certiorari petitions where the holdings were based on material differences in the records or proofs.

2. And thus it will also be seen that where the records and proofs in two cases are in conflict, then that the opinions that follow the respective records and proofs, are not different due to errors of law, but due only to the differences in the facts of the two cases, *which leaves both opinions free of the charge of being in conflict one with the other.*

---

*All italics in quotations in this Brief and Appendix are ours.

3. We understand that this Court makes the basis of granting certiorari petitions the correction of errors arising on the same essential facts—as distinguished from granting this writ in cases where the fact basis of each case is different from that in the other.

Therefore, we submit that:

(a) There must be conflict *between two or more decisions* of the lower Courts *on equal records* establishing the same defense.

(b) But when opinions on their faces show that the proofs in the cases differed on the vital question involved, then the opinions are not in conflict, *but each is presumed to be correct on the record to which it pertains.*

Section II.

Our position is that the record of the cases of Smith v. James Manufacturing Co. and Elmira Hatcheries, which petitioner seeks to bring before this Court, is entirely different from the record as to Hastings prior use in the former case of Wolf v. Buckeye Incubator Co., 296 F. 680, 6th C. C. A., affirming Buckeye Incubator Co. v. Wolf, 291 Fed. 253; and likewise different from the record in Cooley v. Buckeye Incubator Co., 17 F. (2) 453, by the Third C. C. A., affirming Buckeye Incubator Co. v. Cooley, unreported.

In the Snow and Waxham cases, 294 U. S. 1, 20, recently decided by this Court, there was no proof (none —much or little) on the subject of this prior use by Milo Hastings.

Fact Findings and Conclusions of Law by the Court of Appeals for the Second Circuit

This opinion first states that Claim 1 of the Smith patent was held valid and infringed in *Smith v. Snow* (294 U. S. 1) and *Waxham v. Smith* (294 U. S. 20). Then makes this important and pertinent reference to the Hastings prior use involved in the present petition for certiorari:

"Athough the patent has been held valid in a number of cases, only two Circuit Courts have considered Hastings. In a prior litigation (*Buckeye v. Wolf*, 291 Fed. 253, [N. D. O.], affd. 296 Fed. 680 [C. C. A. 6]), there was introduced the publication in The Dollar Hen and other publications as well as the Hastings' application and there it was found that these did not describe an anticipation of Smith's method. While the patent application is referred to, no mention is made of the brief of Hastings' patent attorneys. *Hastings was not a witness nor was any witness called to testify to what his prior use had been.* In *Buckeye v. Cooley* (17 F. [2d] 453) the same evidence was in the record and Hastings was a witness, but the Third Circuit found his testimony unconvincing and that alleged prior uses were not of Smith's method because they did not provide for a regular current of air. *This is the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated.*

"On the record now before the court, it is impossible to agree that Smith's discovery was not 'known or used by others in this country before his invention or discovery thereof.' *Decree reversed."* (Appendix, pp. i, ix, full copy of this Second C. C. A. opinion.)

Thus at the very beginning of the opinion of the Second C. C. A., the Court shows that it had examined the proof concerning the Hastings prior use in the cases of *Buckeye Incubator Co. et al v. Wolf*, and *Buckeye Incubator Co. et al v. Cooley*, and found the evidence on that subject in those cases to be unconvincing and insufficient, which led the Court to say:

"This is the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated." (Appendix, p. ix.)

As petitioner seeks to show that the Hastings prior use proof was the same, or substantially so, in the Wolf

and Cooley cases, we have examined those opinions and have found the situation to be as stated above by the Second C. C. A. and as likewise stated in this brief. We have also found that petitioner's assertions, through counsel, as to the prior use proof in the Wolf and Cooley cases, are seriously incorrect.

In *Wolf v. Buckeye,* 296 F. 680 ,the Sixth C. C. A. affirmed Judge Westenhaver of the lower Court, and in that way adopted, without repeating, his summary of the evidence in the Wolf case respecting the Hastings prior use in that case. This is the summary:

> "The special contentions of the defendant remain to be considered. Of these, the one most strongly stressed is the alleged prior uses and public disclosures of Milo Hastings. He was not called as a witness. *No witness was called to testify what Hastings did. The evidence of his use or disclosure consists of four newspaper articles and his rejected application for a patent.*. The newspaper articles were published in the 'Dollar Hen' in the year 1909, in 'Poultry Culture' in February, 1912, in 'Boston Sunday Globe,' November 10, 1912, and in the 'Technical World' in April, 1913." (291 F. 253, 257; adopted in affirmance in 296 F. 680.)
>
> "The other articles relate to two hatcheries said therein to have been constructed by Hastings, one at Muskogee, Okl., and the other at Port O'Connor, Tex. Whether either hatchery was a commercial and practical success cannot be discovered from the articles, *and it is not proved by the evidence.* When these articles were written, the hatcheries appear to have been ready to open and to do business, but the hatching appears to have been so far only experimental. The subsequent history of the hatcheries, whether they ever passed beyond the experimental stage, or were commercial failures and abandoned for that reason, or failed for some other reason, is not made to appear, * *." (Lower part p. 257,

top p. 258, of 291 Fed.; adopted in affirmance in 296 F. 680.)

The Court of Appeals for the Sixth Circuit, without discussing the evidence referred to in the lower Court, merely overruled a motion by the defeated party to enlarge the record by the introduction of further testimony, and then affirmed the District Court, 296 F. 680. We take this to mean that the C. C. A. adopted the lower Court's findings and found the showing insufficient to establish such prior use.

Testimony of Hastings Showing the Differences Between the Evidence Recited by Judge Westenhaver in the Wolf Case and Adopted by the Sixth C. C. A., as Compared with the Evidence Stated by the Second C. C. A. in Support of Davis and Muskogee Prior Use Incubators

Hastings testified:

"Judge Westenhaver, in his opinion, referring to this application [Hastings'] and the specification thereof, says the following: 'No provision is made for removing foul air, or supplying fresh air, or conserving moisture. No well defined channels for the circulation of air are provided.'" (Rec. 755, Fol. 2263, Vol. II.)

"Ventilation provision was made, as I have previously described, in both the Davis and the Muskogee hatcheries. In regard to the second idea involved in the Judge's statement, which relates to the flow of air in directed channels: In both the Davis and the Muskogee incubators, this flow of air, by means of a forced draft, impelled by a fan, was very definite, as I have described, being in a complete circuit through the fan, the heating chamber and the incubating chambers." (Rec. 755, Fol. 2265, Vol. II.)

Hastings further testified:

> "The actual use in both the Davis and the Muskogee incubators involved the use of a fan which drove the air in a definite enclosed and complete circuit. The air currents in both incubators are directed to flow in definite channels including passage through the egg chambers, in both incubators, this passage being from the top of the chambers down through the trays of eggs to the bottom. * * The circuit of air flow through the chambers, through a heating chamber and through the fan, was the same in both incubators and was a definite closed circuit. The idea that the air was blown into the chamber and allowed to escape where it would, is incorrect. By far the major portion of such air flow was in both cases returned and recirculated through and by the fans. The exception to this is the necessary relatively small fraction of the air flow or exchange of air which in both incubators was provided for to allow of new oxygen and the escape of carbon dioxide gases." (Rec. 754, Fols. 2261-2, Vol. II.)

Hastings also testified:

> "Therefore, we used the method of introducing trays of newer or younger eggs, as we call them, in between the trays of older eggs, to reduce this heating tendency and to equalize the temperature of the eggs at *different stages of incubation,* * *." (Rec. 762, Fol. 2285, Vol. II.)

This establishes controlling differences in the record of the Wolf case as compared with the proof of the Davis and Muskogee incubators in the present cases. *Not a single witness testified at all in the Wolf case as to the Hastings prior use. There was no parole evidence at all.* Yet counsel for petitioner say:

> "The evidence dealing with the Hastings defense was in substance the same in these Wolf and Cooley cases as in the suits at bar against Hall and James."

These differences in the two records, the Wolf and the James and Elmira cases, bring this case within the ruling of this Court when it denied certiorari petitions in the Rubber Tire cases, cited supra, where the differences in the records before the Sixth and Second Circuits are stated by this Court at pages 430, 433, 434, in *Diamond Rubber v. Consolidated,* 220 U. S. (supra, pages 4 and 5). We submit this disposes of the Wolf case.

Opinion in Cooley Case as Compared with That in the James and Elmira Cases as to the Hastings Prior Use

The Third C. C. A., 17 F. (2) 453, affirming the District Court, whose opinion is unreported, grouped several unrelated prior uses, that by Hastings and some others, and used the same language in disposing of all of them collectively—saying:

> "An important thing to note is that in these structures and in their uses when the eggs were to be turned, the trays would be drawn out one at a time, the eggs turned by hand and the trays pushed back. More important still, there was no arrangement [as proved in the Cooley record] for establishing and regulating currents of heated air and, similarly, no provision for obtaining uniformity of temperature other than that initially provided by the heating means. Moreover, it should be noted that the heated air, like the wind, would go where it listeth and, accordingly, it acted as it pleased. *The result was negative, and, judging from what happened to the hatcheries, it was not successful.*" (Pp. 454-5.)

But in the particulars where the evidence touching the Hastings prior use was lacking and insufficient in the above cases, the evidence before the Court of Appeals for the Second Circuit is ample and complete as found by the Second C. C. A. in its opinion. And next, we have

the informed and forceful fact stated at the close of the opinion of the Second C. C. A., to-wit:

> "This is the first time the prior uses at the Davis place [Brooklyn] and at Muskogee have been so fully presented and substantiated."* (Appendix, p. ix.)

Testimony of Hastings Showing Differences Between Material Mentioned by Third C. C. A. in the Cooley Case and the Proof as to the Davis and Muskogee Incubators in James, et al.

Hastings testified:

> "In the opinion of the Circuit Court of Appeals for the Third Circuit, in the case of *Buckeye* * * *v. Cooley,* * * Judge Wooley uses the following language with respect to the Davis incubator of 1911, the Hastings' application for a patent of 1911, and the Hastings Muskogee Hatchery in 1911 and 1912, and the Hastings Port O'Connor hatchery in 1912: 'More important still, there was no arrangement for establishing and regulating currents of heated air, and similarly no provision for obtaining uniformity of temperature other than that initially provided by the heating means. Moreover, it should be noted that the heated air, like the wind, would go where it listeth and, accordingly, it acted as it pleased. The result was negative and, judging from what happened to the hatcheries, it was not successful.'" (Rec. 757, Vol. II, Fols. 2270-71.)
>
> "The statement as applying to the Davis and Muskogee hatcheries, which I have described, that the air currents were not definitely directed, and the 'air going where it listeth' is incorrect, because in both of these plants, as described and illustrated by

*The testimony in Smith v. Hall establishes the Hastings prior use at the country seat of a Mr. Davis, more fully and satisfyingly than was the proof before the Third C. C. A. And on the other hand the testimony and record proofs of the Hastings-Muskogee prior use are established in these James and Elmira cases in a fuller measure. **There record evidence, verifying time, place and results were before the Second C. C. A. and are now before this high Court.**

drawings I have discussed, the air current was a fan-driven current and in a complete circuit, returning to the fan. Therefore, it must have been a definite and directed current, and was." (Rec. 757, Fol. 2271; Rec. 758, Fol. 2272.)

"In both the Davis and the Muskogee incubators the air through the incubating chamber was driven by a fan and was an enclosed or complete circuit, returning to the fan, and, therefore, the air did not go where it listeth but where the fan impelled it." (Rec. 757, Fol. 2274.)

"The Judges' opinion that the results were negative seems to me to have no meaning, since both the incubators hatched successfully, the success of the hatches depending upon the quality of the eggs, as with other incubators. The conclusion that the Judge has derived, that the operation of the incubator was unsuccessful, is evidently from the fact that I did not continue to operate the machines. I built the machine for Mr. Davis. He owned the machine. I operated it the first season, employed by him to do so. There was not sufficient work there on his poultry farm to justify his retaining my services and, therefore, I left upon completion of that hatching season. In Muskogee, I built the machine for Mr. Lieber and was paid to do so and to operate it. The Muskogee machine engaged in custom-hatching. With my own youthful enthusiasm to do a big business quickly, and Mr. Lieber's desire to promulgate the poultry industry, we offered to do custom-hatching at a very low rate. This was a commercial mistake which resulted in showing no profits from the season's work, because the miscellaneous expenses of operation and labor were greater than anticipated, *but the failure of the hatchery to return a profit was not based upon the failure of the incubator to hatch eggs.*

"I did not build either incubator to sell, I was employed to build and operate both incubators for the individuals for whom I built them, and they were

operated for the purposes that I have described, and not to sell these machines." (Rec. 759, Vol. II, Fols. 2275-2278.)

This establishes differences* in the records in the Cooley case in the Third C. C. A. as compared with the proof of the Davis and Muskogee incubators in the present cases. These differences in the two records bring this case within the ruling of this Court when it denied certiorari petitions in the Rubber Tire cases where the differences in the records before the Sixth and Second Circuits are stated by this Court in *Diamond v. Consolidated,* supra.

Section III

The following is a summary of the evidence in the James et al and Hall cases, with especial reference to the new testimony and documentary proof, which *was not considered* in any other previous case. And this new evidence is the basis of the learned opinion of the Court of Appeals for the Second Circuit, which has held:

"This is the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated." (Appendix, p. ix.)

---

*Note: In the Cooley case the District Court wrote an opinion, never reported in Federal Reporter, or elsewhere. He discussed the Hastings prior use by quoting somewhat from Judge Westenhaver in the Wolf case. But the Third C. C. A. itself wrote its own opinion in language it preferred. Nevertheless it affirmed the action of the District Court in holding the Hastings prior use was not established in that record. As opinions of District Courts—this one unreported as well—are not a basis for finding conflict of opinion, we go no further than to make this explanation. Should the Court care to examine the short testimony of Mr. Hastings in which he points out the differences between the proof referred to by the District Court in the Cooley case, and the proofs before the Second C. C. A., see Rec. 756, Fol. 2266-7; and Rec. 757, Fol. 2269-70.

This Hastings testimony establishes vital differences in the record of the Cooley case discussed by the District Court, as compared with the proof of the Davis and Muskogee incubators in the present cases.

This primary defense of invalidity received no discussion or no apparent consideration in the opinion of the District Court, Judge Knight, in James et al. Partial proof of this defense has been considered in two other C. C. A. cases, but it was rejected on account of insufficient proof. The complete record of it has never been before any court until proved in the James, Elmira and Hall cases. For instance partial proof of this prior use consisting of only four newspaper articles and the rejected Hastings application for a patent was all that was before the Court in the case of *Buckeye et al v. Wolf,* affirmed in 296 F. 680. This same partial proof was offered in the Cooley case, in the Third C. C. A., with some testimony of Hastings.

The reason given for rejecting this prior use by the Court of Appeals for the Third Circuit on the proof then before the Court was that the proof failed to show the actual construction of the anticipating Hastings incubator or that the same was an operative device. *This was the difference in the proof in that case and these James and Elmira cases.*

New Evidence in the James Case

For the first time in any case, the James record contained proof of the Hastings prior use at Muskogee, Oklahoma, based upon contemporary record evidence comprising original photographs, printed dated publications in the national and local press, the original blower in the Muskogee incubator, and the testimony of a number of new witnesses. This proof disclosed a complete anticipation of the Smith patent.

operated for the purposes that I have described, and not to sell these machines." (Rec. 759, Vol. II, Fols. 2275-2278.)

This establishes differences* in the records in the Cooley case in the Third C. C. A. as compared with the proof of the Davis and Muskogee incubators in the present cases. These differences in the two records bring this case within the ruling of this Court when it denied certiorari petitions in the Rubber Tire cases where the differences in the records before the Sixth and Second Circuits are stated by this Court in *Diamond v. Consolidated,* supra.

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This Hastings testimony establishes vital differences in the record of the Cooley case discussed by the District Court, as compared with the proof of the Davis and Muskogee incubators in the present cases.

This primary defense of invalidity received no discussion or no apparent consideration in the opinion of the District Court, Judge Knight, in James et al. Partial proof of this defense has been considered in two other C. C. A. cases, but it was rejected on account of insufficient proof. The complete record of it has never been before any court until proved in the James, Elmira and Hall cases. For instance partial proof of this prior use consisting of only four newspaper articles and the rejected Hastings application for a patent was all that was before the Court in the case of *Buckeye et al v. Wolf,* affirmed in 296 F. 680. This same partial proof was offered in the Cooley case, in the Third C. C. A., with some testimony of Hastings.

The reason given for rejecting this prior use by the Court of Appeals for the Third Circuit on the proof then before the Court was that the proof failed to show the actual construction of the anticipating Hastings incubator or that the same was an operative device. *This was the difference in the proof in that case and these James and Elmira cases.*

New Evidence in the James Case

For the first time in any case, the James record contained proof of the Hastings prior use at Muskogee, Oklahoma, based upon contemporary record evidence comprising original photographs, printed dated publications in the national and local press, the original blower in the Muskogee incubator, and the testimony of a number of new witnesses. This proof disclosed a complete anticipation of the Smith patent.

In addition to the more complete testimony of Hastings and the repetition of the testimony of various miscellaneous witnesses, some of whom had testified in one case and others in another, but never all in one case to make a complete record, and in addition to a complete deposition on all the facts by Hastings supported by the new, dated documentary evidence, there was produced in this record for the first time the following: The original Hastings blower (Exhibits 22B-22F), used as the means for producing the forced draft circulation in this Muskogee incubator. This was located near Muskogee on the farm of Hastings' partner, Lieber. It was produced and photographs of it appear in the record of this case. This is new evidence. (Rec. Vol. 3, pages 1403-4, Exhibits 22B-22F.) It was developed here, and in this record, for the first time, that *in 1926 Smith had his man Taggart try to buy this blower used by Hastings in this Muskogee prior use. Taggart admitted that Smith knew of this use as early as 1923. Taggart's excuse for trying to get possession of this blower from Lieber was that petitioner Smith wished to create a "museum" of previous efforts.* (Taggart Rec. Vol. 2, pages 940-943; Lieber Vol. 2, Rec. pages 858, 859, 863-868; 875.) This attempt to suppress evidence has been condemned in *Keystone Driller v. General Excavator Co.*, 290 U. S. 240.

As to the new witnesses, there was Hickox, at present an executive of an electrical concern in Chicago, who was commercial agent for the electric power company in Muskogee, and as a part of his duties frequently saw the Muskogee incubator in operation, wrote articles about it to promote the sale of electric current, and had photographs taken of it. He produced his original scrapbook with these original photographs, the type-written copy of his article and the newspaper and magazine clip-

pings showing the local and national publication of his articles. (Rec. Vol. 3, pages 1411-1421. Exhibits 26A-26-G.) This record proof, as well as other photographs and publications were identified by both Hickox and a new witness Peabody, who at that time was the electrical contractor who installed the electrical equipment in this Muskogee incubator. He testified as to the installation of the blower mentioned above. Peabody is now an executive of the Westinghouse Electric & Mfg. Co. Neither Hickox nor Peabody had any interest in the litigation.

Another new witness was C. T. Brewer, a retired United States Postal employee, who had been a customer of Hastings Muskogee incubator, testifying Hastings hatched over a thousand eggs for him. (Rec. Vol. 2, pages 907-908.)

Another new witness was Van D. Campbell, a hatchryman, who as a young man, visited with his parents Hastings incubator when Hastings was hatching eggs for his parents. (Rec. Vol. 2, pages 911-914.)

Lieber testified completely for the first time. (Rec. Vol. 2, pages 856-900.) He was Hastings' financial backer and partner. His testimony was not before the Sixth or Third Circuits.

L. W. Pitts' testimony (Rec. Vol. 2, pages 900-905) was not before the Sixth or Third Circuits.

In addition to the foregoing, new publications in the national press were produced, such as "Reliable Poultry Journal," of April, 1912 (Exhibit 20, Vol. 3, Rec. 1396-1399); "Popular Mechanics Magazine" of November, 1912 (Exhibit 24, Vol. 3, Rec. 1407-1409), and "Electrical World" of July 6, 1912 (Exhibit 25, Vol. 3, Rec. 1410). The new witness Hickox furnished the photographs and descriptive matter upon which the Electrical World article was based.

The new witnesses in the instant case and the new record evidence, plus the presence in this case of the complete testimony of all previous witnesses, some of whom appeared in one case and some in another, conclusively answer the questions of previous Courts, both as to construction and operativeness of this prior use. Consequently, the Court of Appeals for the Second Circuit was able to state that for the "first time" these prior uses were "fully presented and substantiated."

In addition to the foregoing witnesses, the plaintiff's own witnesses admitted the existence and operation of the Muskogee prior use. (L. A. Cory, Vol. 2, Rec. 914-919; Richard Shanafelt, Vol. 2, Rec. 919-932; Samuel James Ward, Rec. Vol. 2, pages 932-940.)

Complete Statement of Hastings Prior Use Proof

Hastings started with incubators on a large poultry farm in Illinois, later entered the Kansas State Agricultural College and was in charge of poultry at the Kansas Experimental Station operating incubators until 1906: in 1908 and 1909 he was poultryman for the United States Department of Agriculture, traveling extensively and visiting poultry plants and agricultural experiment stations operating incubators as an expert in the art of incubation. In 1909 he wrote the book "The Dollar Hen," published by the Arcadia Press, New York City.[1]

> "At hatching time the eggs are spread out in trays in a special hatching room, which is only large enough to accommodate chicks in the amount of one-sixth of the incubator capacity, for twice a week deliverings, or one-third if weekly deliveries are desired.
>
> "There are no pipes or other sources of heat in

[1] Defendants' Exhibit No. 13.

the egg chambers. All temperature regulation is by means of air heated (or cooled as the case may be) outside of the egg rooms and forced into the egg rooms by a motor driven cone fan, maintaining a steady current of air, the rate of movement of which may be varied at will. The air movement maintained will always be sufficiently brisk, however, to prevent an uneveness of temperature in different parts of the room."

Here is a complete disclosure of the use of forced draft and staged incubation in the method of incubating and hatching eggs. Mention being made of "twice a week" or "weekly deliveries" it follows necessarily that the eggs in the egg room would have to be of different ages or placed in staged incubation while the motor driven fan furnished the forced draft circulation in order to maintain an even temperature.

In 1910 Hastings built and operated a 6,000 egg incubator for Walter B. Davis[1] at his country home on Kings Highway, Brooklyn, New York, embodying in this operative machine his ideas or inventions as disclosed in "The Dollar Hen." The drawings shown in Defendants' Exhibit 21, Rec. 1400, prepared under the supervision of Mr. Hastings illustrate this incubator, based on the original photographs, published illustrations and descriptions.[1]

The Hastings Muskogee, Oklahoma, Prior Use

In the fall of 1911 Hastings went to Muskogee, Oklahoma, during the boom in that territory, soliciting aid to build a mammoth incubator embodying his ideas of forced draft and staged incubation. In company with

[1] This prior use has been more elaborately proved, in the case of **Smith v. Hall**, than in this James record. The primary discussion in this case of the Hastings prior use will be that practiced with an incubator similar in general principles at Muskogee in the hatching season of 1912 and 1913.

John G. Lieber, a lawyer and business man[1] of Muskogee and a third party named Ed. Hastain, a corporation was formed and a 30,000 egg capacity incubator built in a building during the latter part of 1911 or first part of 1912, and put in operation for the hatching season of 1912 and ran through that season and the hatching season of the next year, 1913, as well. The same principle of forced draft and staged incubation was employed in the Muskogee as in the Brooklyn incubator, but on a larger scale. As Mr. Hastings testified "The general plan of construction and the principle of operation (of the Muskogee incubator) were quite similar and in accord with those of the Davis incubator, such changes as were made were wholly the matter of expediency in adapting the construction of the building space available and because of the larger capacity of the Muskogee incubator."

There is no dispute in the record as to these facts as the petitioner's witnesses, Richard Shanafelt, L. A. Cory, and Samuel J. Ward testified to the building and operation of this Muskogee incubator. Petitioner's witness Samuel J. Ward after saying that the Hastings incubator produced about a fifty per cent hatch said:

> "I am positive that from my visits to the plant where Mr. Hastings was operating, that the thing was actually in operation and did hatch eggs, regardless of the percentage of the hatches. That was throughout the hatching season of two seasons that I remember, and I think it was in 1911 and 1912."[2]

Photographs were taken at the time of this prior use and articles appeared in newspaper and technical publications carrying these photographs, describing this

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[1] Rec. 728, Fol. 2183, Vol. II.
[2] Rec. Vol. 2, p. 939.

incubator, so that its operation and existence does not depend upon unsupported verbal testimony but upon unusually full proof not before any other Court considering this prior use.

In addition to Hastings' own testimony, the writer of some of the above-mentioned articles, Norman B. Hickox, who was commercial manager for the local electric light and power company in Muskogee at the time, and A. D. Peabody,[1] who was the electrical contractor who installed the electrical equipment of the incubator including the fan and blower, were called and testified. Hickox produced his own scrapbook of photographs made under his direction and articles written by him in 1912,[2] and photographs of the identical blower installed in the incubator are also in the record. John G. Lieber, L. W. Pitts, C. T. Brewer and Van D. Campbell testified as to being familiar with the Hastings Muskogee incubator, that it was an operative machine and was run through two hatching seasons.

Based upon the original photographs and descriptions published at the time of the operation of the Hastings Muskogee incubator, assembly drawings were made up, showing the complete machine as embodying forced draft circulation and staged incubation.[3] These drawings are identified as correctly showing this incubator by Hastings, who conceived the same, Lieber who furnished the money to build it, Hickox who saw it in operation and had photographs taken of it in operation and Peabody, the electrical contractor who put in the fans and other electrical work. (Rec. Vol. 2: 831-55.)

The testimony of these witnesses stands uncontra-

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[1] These are new witnesses producing new contemporaneous documents and exhibits. They have no interest in the outcome of the suit.

[2] Defendants' Exhibits 26, and 26A to 26G, and 22B to 22F, Rec. Vol. 3, pp. 1411 to 1420.

[3] Defendants' Exhibits 22 and 22A, Rec. Vol. 3, pp. 1401 and 1402.

dicted and agrees that the Hastings Muskogee incubator consisted of a large room in which there were a series of stacks of egg trays containing from 250 to 300 eggs per tray, each stack containing about 5,000 eggs. There was a corridor in front of the trays for men to work in, loading and unloading the trays. Moisture was provided by water pans. In an adjacent corridor a fan blew an air blast through the corridor and thence downwardly through the stacks of egg trays and back into the fan. This fan was made by the Emerson Electric & Manufacturing Company, with a normal speed of 1150 r.p.m. (Rec. Vol. 2: 853.) The fan was found to give insufficient air, according to Hastings and the electrical contractor, Peabody, and a Sirocco blower was substituted. This blower has been found and photographs taken of it and the blower identified. (Defendants' Exhibits Nos. 22B to 22F inclusive, Rec. Vol. 3: 1403.) This was the blower Smith tried to buy in 1926. (Rec. Vol. 2: 867 and 943.)[1]

The manner and method of the operation of this incubator provided for the distribution of the heat to maintain

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[1] In Defendants' Exhibits 22 and 22A, drawings of Hastings' Muskogee incubator, a door entered into the hatchery as shown on the drawings, marked "A." This led into an antechamber marked "B." A further door marked "C" led into a work room of the chamber marked "D." The incubating chambers, of which there were seven, are indicated by the letter "E." The individual trays that slide into these chambers are marked "F." A chamber marked "G" contained a blower marked "J." At the opposite end of the hatchery is another chamber marked "G-1" which contained the heater marked "H." A thermostat marked "I" was also installed for the purpose of regulating the heat. A moisture pan marked "L" was located in the blower chamber. A passageway behind the incubating compartments, through which the air from the blower passed, is marked "N" and a passageway through which the air also passed and was distributed to the seven individual hatching compartments is marked "O." The circulation of the forced draft current of air impelled by the blower is shown by arrows. Openings with movable slides, marked "R," led from the chamber "O" into the seven individual hatching or incubating chambers. The purpose of these openings and the adjustable slides was to permit of the distribution of the air from the forced draft of the blower to the individual hatching chambers and the slides were for the purpose of adjusting the flow of the air to each hatching chamber as operation required. (Rec. Vol. 2, p. 733.)

equal temperature throughout all egg chambers and was carried out by means of the forced draft of air as propelled by the blower past the heater and distributed in the long chamber marked "O" to the seven separate incubating chambers marked "E." In these chambers the air, which entered at the top, was driven by the forced draft vertically down through the egg trays and was returned by an open space beneath the trays to the fan or blower, from which the circuit passed the heater or continued on a complete continuous circuit. The accuracy of this drawing representing the machine as described in the publications and illustrated by the photographs, is testified to by Hastings, Lieber, Hickox and the electrical contractor, Peabody, who installed the fans and electrical controls.

Lieber said these drawings, were "about as near a drawing of the incubator as it was set up as you could get without taking an actual photograph. Of course, the—it may not run true as to size, etc., or inch or quarter inch, or whatever you might call it, or as to scale, but that is approximately like it was set up after the blower was set up." He testified that this incubator was in actual operation during the hatching seasons of 1912 and 1913—that "it hatched thousands of eggs into chicks;" and that during the year 1912 the percentage of hatch ran from nothing in some cases to as high as 75 per cent or 80 per cent in other cases.

A photograph of this motor driven blower "J" in the incubator, and the interior of the incubator, with this description, appeared in "Electrical World," July 6, 1912. (Defendants' Ex. 25; Rec. Vol. 3: 1410.)

> "Muskogee, Okla., has a 30,000 egg incubator, the heat control and air circulation for which are effected by electrical means, while the growth of the chicks is artificially forced by tungsten electric

light. Use of motor-driven blowers to circulate the air heated by natural-gas burners has made possible the compact construction of this hatchery, the egg trays of which are superimposed on racks twenty deep. Five thousand eggs can thus be handled and hatched in a space of 2 ft. by 4 ft. by 4 ft., requiring only about one-tenth of the volume demanded by the old style incubators."

Hickox stated: (Was not a witness in Wolf and Cooley cases.)

"* * * The large capacity is attained, by superimposing twenty trays, one above the other, so that 5,000 eggs fill a single chamber measuring about 2 by 4 by 4 feet. * * *

"It is a very simple idea, that of placing the trays one above the other, and like all other simple ideas it has been tried before, but failed to work on account of the fact that it was hard to heat up such a large mass of eggs and maintain the temperature constant at all points. This was overcome, however, by the use of an electrical centrifugal fan, which drives a blast of warm air through the mass of eggs from top to bottom and heats the entire mass of eggs (or cools it) at the will of the operator. The amount of moisture in the air is governed by the moisture introduced at the fan, as is shown in Figure 2. * * *

"Outside air can be admitted to this compartment whenever necessary. This also shows the pan of water underneath the fan, to keep the moisture in the air at the right amount. * * *

"From here we enter the main incubator, in which the temperature is always kept at 100 degrees. * * *" (Rec. Vol. 831-51.)

In the Hickox album (Defendants' Exhibit 26) were the original photographs of the motor driven blower "J," the superimposed egg trays "F," which slide in

the incubator chambers "E." Hastings is shown in the work chamber "D." (Defendants' Exhibits Nos. 26B-C-F.)

The Hastings' Muskogee incubator was not financially successful because an attempt was made to do custom hatching for those who supplied eggs to the hatchery at the impossibly low price of one-cent an egg. But the operation of the incubator itself was successful in that it hatched satisfactory percentages of the eggs set in it. Hastings testified:

> "The quality of hatches in the Muskogee 1912 incubator were very highly variable and rated all the way from complete failures of small lots, to back lot winter eggs that were brought in by local poultry men, to excellent hatches that were secured from eggs of a good hatching quality provided by more skilled poultry men. I best recall the hatching percentages of white leghorn eggs that I purchased throughout that hatching season from a man named Gaunt who resided at Benton, Arkansas. I found from an early trial of these eggs that they were good hatching quality, and, hence, for the purpose of producing chicks for sale, we bought throughout the season an average of two cases a week, and these eggs hatched uniformly well throughout the season, and the hatching percentages never fell, with the Gaunt stock, below 70 per cent of all eggs purchased." (Rec. Vol. 2: 739.)

Lieber testified:

> "It hatched thousands of eggs into chicks * * *. My recollection is that it ran from nothing in some cases to as high as 75 and 80 per cent in other cases!" (Rec. Vol. 2: 863.)

Hickox further testified:

> "I probably visited the Hastings incubator five

or six times. Muskogee was a very active growing city; people were coming in all the time, establishing their homes, establishing businesses. And so far as the Hastings business was concerned, to my recollection every time I was ever there there was business being done. People were either bringing eggs to be hatched or were taking away baby chicks, as I recollect it, from their own eggs or were purchasing baby chicks that were being sold there as freshly hatched." (Rec. Vol. 2: 844.)

L. W. Pitts, now a retired government clerk, living in Muskogee, Oklahoma, said that during the years 1911, 1912 and 1913 he was connected with the Indian Agency and was engaged on a small scale in the poultry business operating small incubators. He testified that he recalled distinctly the Hastings Muskogee incubator and that it was in operation in Muskogee during the hatching season of 1912 and 1913. He visited this incubator on several occasions, one time being a visit paid by the Poultry Association of Muskogee during the hatching season of 1912, when the Hastings incubator was in operation. (Rec. Vol. 2: 900-5.)

C. T. Brewer, now a retired United States Post Office employee living in Muskogee, Oklahoma, where he has resided for thirty-two years, testified that Hastings built the Muskogee incubator and that it was operated in Muskogee as a commercial hatchery during approximately the years 1911 or 1912. He had as many as two or three hundred eggs hatched in this incubator himself, and, in addition to the eggs which he had hatched he sold in the neighborhood of one thousand eggs to the company operating the Hastings incubator for commercial hatching. The results of these hatches were satisfactory and he received a percentage of 70 per cent to 75 per cent of hatch. (Rec. Vol. 2: 908.)

Van D. Campbell and his wife operate now the Marathon Hatchery in Muskogee, Oklahoma; he is familiar with the hatching business, is a carpenter and has installed incubators. He came to Muskogee from Kansas in 1911 and recalled the Hastings incubator in Muskogee. He saw the incubator in actual operation himself and he and his family had eggs hatched in this incubator. His testimony was that "I know that it hatched chickens." (Rec. Vol. 2: 912.)

Petitioner's witness Cory testified that he was in Muskogee at the time Hastings had his incubator and that he was acquainted with him. He saw this incubator in actual operation and that it continued to be operated throughout the whole hatching season of 1912 under Hastings' supervision and that it likewise was operated throughout the next season by Hastain. (Rec. Vol. 2: 917.) Although he did not obtain any hatches from the eggs which he placed in this incubator, he testified that he thought at the time that some of his eggs were hatched, but that Hastings was operating a chicken farm a little north of Muskogee, and his opinion was that Hastings had taken the chicks that were hatched from his eggs and put them out on his chicken farm. He further testified that the Hastings hatchery was "well patronized by people interested in the poultry industry at that time." (Rec. Vol. 2: 918.)

Cory was raising chickens at this time himself and selling eggs for hatching purposes to others. He admitted that he had received several complaints from others to whom he had sold eggs as to the eggs not being fertile and not hatching. (Rec. Vol. 2: 916.)

Petitioner's witness Shanafelt, during 1911, 1912 and 1913, lived in Muskogee, Oklahoma, and was interested in poultry raising at that time. He became a customer of the Hastings hatchery and took approximately two

hundred eggs to be hatched and obtained very poor results. However, it develops that when Shanafelt took his eggs to be hatched in the Hastings incubator it was being operated with the exhaust fan and not with the blower. He never turned over to the Hastings incubator but one batch of eggs to be hatched and he saw the machine in actual operation and knew that it hatched some chickens, and that the machine was operated throughout the hatching season of 1912. Also that after Hastings left, Hastain continued in the operation of the incubator. (Rec. Vol. 2: 929 and 930.) Shanafelt testified that Hastings' method of operating this incubator, in the way he handled eggs, was very careless and negligent and that some customers would turn over to him eggs of one breed to be hatched, and, on account of the carelessness of Hastings in the handling of the eggs, would be given chicks of a different breed from the eggs which they had turned over to him. Shanafelt had a small flock of hens himself and was unsuccessful in getting a good hatch of chickens.

> "I know that he did actually hatch chicks in that incubator, regardless of the percentage of the hatch. I am sure, at that time, I got—seems to me it was two or three chickens out of my batch that were white chickens and I was breeding black chickens. I know it hatched some chickens." (Rec. Vol. 2: 928.)

Petitioner's witness Ward lived in Muskogee, Oklahoma, from 1911 to 1913 and was a salesman for the Binding Stevens Seed Company, selling seeds, poultry feed, incubators and supplies. He recalled the Hastings incubator and was in the place of business of the Hastings Muskogee Hatcher several times. He testified that the first hatches which Hastings obtained only ran from five to twenty per cent of the fertile eggs, and that Hast-

ings changed or remodeled his incubator and got better hatches.[1] He admitted that the Hastings incubator was operated through two hatching seasons, but was under the impression that those seasons were 1911 and 1912. The only change or remodeling of the Hastings incubator which he knew of was a change in the location of the exhaust fan and he was positive that the Hastings incubator was actually in operation and did hatch eggs throughout the hatching season of two years. (Rec. Vol. 2: 932-40.)

The witnesses for the petitioner admitted that the Hastings incubator was operated in Muskogee throughout these two hatching seasons. The testimony of Shanafelt, Cory and Ward, as to poor hatches that were obtained, all related to the incubator as originally installed with the exhaust fan as the means of providing the forced draft circulation of the heated air. Hastings testified that the capacity of the incubator was too large to successfully operate and obtain the best hatches with this exhaust fan, which was the reason for the change, substituting for the fan the Sirocco blower with stronger forced draft. *There is no testimony from any witness of any mechanical failure of the incubator to operate, in securing successful hatches of eggs, after the substitution of the Sirocco blower for the fan in the incubator.*

Hickox's (respondents witness) photographs and articles corroborates the description given by Hastings in his testimony and corroborate the illustrative drawing showing the complete incubator. Peabody, the electrical contractor, said of the illustrative drawings, Exhibits 22 and 22a: "represents the general scheme that was employed in supplying warm fresh air for this incubator." As to the success of the incubator Peabody tes-

[1] This change was the substituting of the Sirocco blower for the Emerson exhaust fan.

tified: "I know that incubator was actually used and placed in operation. * * * I did not hear any criticism either of Mr. Hastings personally or the operation of that incubator." (Rec. Vol. 2: 854.)

Thus, this Muskogee incubator was actually built, installed and operated for two years—that is, the two hatching seasons for the years 1912 and 1913. Its construction and operation and the results were testified to by Hastings, Hickox, Peabody, Lieber, Pitts, Brewer and Van D. Campbell. The petitioner's witnesses testified to the same effect: Cory, Shanafelt and Ward.

The only objections the petitioner made to this testimony below were these:

That the construction of this incubator is uncertain, resting on oral testimony without the benefit of contemporaneous memorandum; that Hastings in this incubator was proceeding along an entirely different way from Smith and finally that Hastings' efforts resulted in financial failure, his incubator only operating through two seasons.

In answer to these propositions we directed the Second C. C. A.'s attention to the contemporaneous corroborating memoranda, consisting of photographs taken of the incubator itself at the time of its operation in 1912 and articles describing it published at the same time, such as Defendant's Exhibits 22B to 22F inclusive, Rec. Vol. 3: 1403-4, Defendant's Exhibits 23, 24, 25, 26A to 26G inclusive, Rec. Vol. 3: 1405, 1407, 1410, 1411-21, supporting the oral testimony of the witnesses.

As to the Hastings Muskogee incubator operating along different lines from the Smith alleged invention, there is no doubt on this record but that Hastings used staged incubation along with forced draft circulation.

As a matter of law, the fact that this prior use was unprofitable does not militate against it as a prior use,

nor does the fact that the apparatus was crude and the electric fans not as perfect as they are today militate against it as a prior use.

As Mr. Chief Justice Taft, in *Corona v. Dovan*, 276 U. S. 358, 384, said:

> "It is a mistake to assume that reduction to use must necessarily be a commercial use." (P. 384.)

As said in *Brush v. Condit*, 132 U. S. 39 (1889):

> "The case is that of the public, well known practical use in ordinary work, with as much success as was reasonable to expect at that stage in the development of the mechanism belonging to electrical arc lighting, of the exact invention which was subsequently made by the patentee; and, although only one clamp and one lamp were ever made, which were used together two and one-half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject." (P. 48.)

Thus even if the petitioner is right that the Muskogee use was not successful as a financial venture, yet it is still a good prior use.

On the proposition that the testimony of Hastings and the corroborating witnesses contained many mistakes and differences in non-essentials, we believe it is the experience of the Courts and the bar that such a condition is a good reason for accepting the testimony of responsible witnesses because it shows their truthfulness. It is only the untruthful who are meticulously accurate in immaterial details. The Court of Appeals for the Second Circuit has had occasion to so find in *Corrington v. Westinghouse*, 178 F. 711 (2 C. C. A.), where it said:

"It is true that prior use must be established beyond a reasonable doubt, but testimony must be weighed in a patent cause as in other causes and the court *is not permitted to reject arbitrarily the testimony of respectable witnesses because of mistake and differences in non-essentials.*" (P. 717.)

There has been no misrepresentation by Hastings and his witnesses. There has been no rebuttal; indeed, the petitioner's witnesses corroborated this prior use. This prior use is splendidly proved by impartial men of high standing, supported by contemporaneous public statements and published photographs.

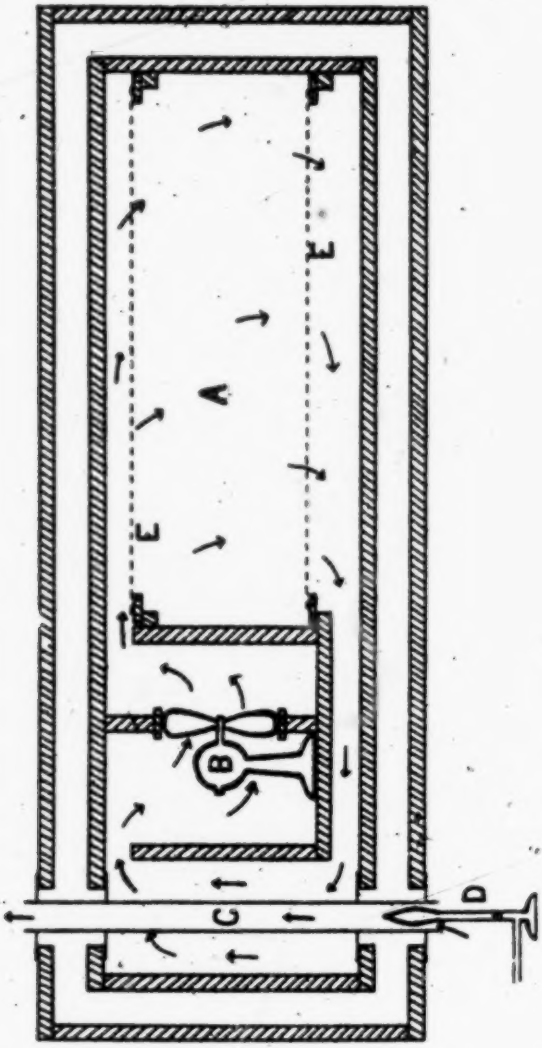
Can it be true that Smith was not aware of these developments of Hastings—that were so widely advertised prior to his efforts in the field? Smith was not called to rebut this presumption.

Taggart, a claimed expert and long employee of Smith, testified that Smith "knew there had been an incubator started down there." (Rec. Vol. 2: 943.)

Petitioner would now have this Court believe that the Sirocco blower was not used by Hastings at Muskogee. Smith's action in sending Taggart in 1926 to buy this blower for $50.00—many times its value—is the best evidence that it was used by Hastings and that its existence was embarrassing to Smith. The reasons advanced why Taggart would not meet Lieber's terms so as to purchase this blower were given by Taggart that he wanted $5,000 for it and also wanted as a stipulation to the purchase an agreement that it should not be destroyed. (Rec. Vol. 2: 943.)

The real purpose of Taggart, on behalf of Smith, was to acquire possession of the physical evidence of this prior use and place it where it would not be harmful to Smith. This practice has been condemned by this Court recently in *Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240, decided December 4, 1933.

Reproduction of Hastings 1911 Patent
Application Drawing



WITNESSES:
Walter B. Davis.
Isakel & Barkhuff.

INVENTOR.
Milo Hastings
BY
ATTORNEY.

Hastings Patent Application Proof of Prior Use

Under this branch of the case the proof shows two things:

(a) Hastings was a prior inventor to Smith on the issue of prior inventorship.

(b) Hastings had the invention at the time of the prior uses at Brooklyn (1910) and Muskogee (1911-1913) and that the incubator of these prior uses embodied the ideas of his pending patent application.

Hastings filed a patent application of May 3, 1911, which was prepared by himself.[1] It read as follows:

"My invention is that of a hatchery in which I secure better ventilation and a more uniform temperature through the hatching chamber *by substituting a forced draft for gravity drafts.* * * * *B is an electric fan which is to run constantly, maintaining a steady current of air through the hatching chamber,* C is a heater, D any uniform or regulated source of heat. I use a gas flame, the pressure of which is controlled by a governor. EE are fabrics or perforated partitions for the purpose of causing an even horizontal distribution of air throughout the hatching chamber.

"I believe it to be *best to cause the air to enter the hatching chamber from above,* but my invention is not limited to any particular circulation or movement of the air as by the use of the fan the gravity drafts may be overcome and the air caused to move in any desired direction.

"Ventilation I secure through cracks around the door of the hatching chamber or *other small openings in any part of the air circuit.* The air being constantly in motion, requires less rejuvenation than dead air.

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[1] Plaintiff's Exhibit I—Rec. Vol. 3: 1007 to 1047.

> *"The part of my apparatus that is new*, and which has not before been used in connection with hatching devices, *is that of the fan*, and this I maintain to be of distinct utility in securing uniform ventilation and an even temperature throughout all parts of the hatching chamber.
>
> "I claim: The combination in a hatchery for the eggs of domestic fowl, of a room or chamber for holding eggs to be incubated and a *fan pump, or other mechanical device with moving parts for causing a circulation of air in or through such chamber."* (Rec. 1015, Vol. III.)

This application drawing was witnessed by Walter B. Davis, at whose home the apparatus of the application had been reduced to practice as above described in the Brooklyn prior use. (See Rec. Vol. 3: 1047.)

The Patent Office rejected Hastings on the ground of lack of invention because it was the application of a forced draft of air in a circuit, old in heating and ventilating patents, and there was no invention in substituting such old heating and ventilating patent structures as in an incubator where eggs were treated instead of some other material. Hastings insisted that this was invention. The Patent Office Primary Examiner and the Board of Appeals by a majority of 2 to 1, held it was not invention. One of the three members of the Board dissented and held that it was invention. The claim that Hastings appealed upon with the aid of an attorney, read as follows: (Rec. 1026.)

> "A hatchery for eggs embodying an incubating chamber adapted for the reception of superposed trays for eggs to be incubated, whereby said eggs will be arranged in layers one above the other, means for effecting a distribution of air uniformly to the eggs in the chamber, means for heating the air, and mechanically operated means for forcing a uniform circulation of air through all parts of the chamber and past the heater, whereby con-

vexion currents will be eliminated, temperature and gaseous stratification of the air in the chamber overcome, and the eggs subjected to the influence of air of the same temperature and composition."

The same problem that Smith claims he solved is pictured in this application in the signed statements on behalf of Hastings by his attorneys, Messrs. Church & Church, whom we believe have been well known to this Court.

> "The problem presented to applicant was one which finds no analogy in the small incubators such as are commonly used throughout the country, for in them the chamber is of such small size and the eggs located so close together in a vertical direction that the disturbing influence due to convexion currents and air stratification amount to nothing. It is well known that eggs during the process of incubation exert a very marked influence on the air surrounding them, as the temperature of the eggs themselves varies in accordance with the stage of their development and the gaseous emanations tend to produce vitiated conditions which exert a marked influence upon the eggs themselves, and especially upon adjacent eggs, if the eggs are at different stages of their development. * * *"

After stating, on May 24, 1912, when they made these statements, *that they had examined "a mass of data and infomation derived from a practical hatchery of large capacity which is being operated by the applicant,"* (Rec. 1025) *they submitted that the applicant had provided that "this forced circulation must be such as to overcome the counteracting influence of the eggs upon the air when said eggs are in the different stages of incubation.* This feature has seemingly never been effectually worked out by investigators along this line prior to applicant, and it seems to the attorneys to present all of the characteristics of a patentable invention of the highest order." (Rec. 1027.)

And these same attorneys in their brief before the Board stated:

> "Plants actually constructed by applicant have been competent to handle from 30,000 to 150,000 eggs and upwards at one time, for it is only by the handling of such large numbers of eggs that the expense of scientific handling and incubating operations can be reduced to a minimum." (Rec. 1035.)

This brief on behalf of Hastings by Church & Church would be a perfect brief on behalf of Smith. Compare Hastings' argument which he himself made before having an attorney, before the Patent Office, that such a substitution was invention, with the finding of this Court in sustaining the Smith patent to the same effect.* Hastings, receiving the adverse two to one Board decicision made March 11, 1913, had insufficient funds to carry the matter further. (Rec. Vol. 2: 762-3.)

If the Patent Office had rendered the same judgment as this Court has recently rendered, Hastings would have received the patent and not Smith.

***Hastings Filewrapper Statement on Prior Art**

"These patents refer to the use of forced ventilation for purposes unrelated to incubation. The use of a forced draft in combination with an incubator I contend to be patentable, as it is a distinctly new use of a well known mechanical device, which in its new use required invention to reach and which has distinct utility."

"To contend that the new use is not patentable because passages for natural drafts exist in well known types of incubators is unsound; thousand of well known patents including the two cited by your examiner would be thrown out by a similar line of reasoning. There are scores of existing incubator patents based upon the form of these natural draft passages, and I maintain that the introduction of a device for generating a force draft to be of far greater uniqueness and utility than the varying designs for utilizing natural drafts." (Rec. 1019.)

Supreme Court Statement on the Prior Art

"The Proctor & Knowles patent, No. 426,321, of 1890, and the Schwartz Patent No. 535,175 of 1895, for methods and apparatus for drying tobacco and other materials, as well as other procedures for ventilation, are so remote from the problems and procedure for hatching eggs as to call for no comment." (294 U. S., pp. 1, 17.)

This abandoned application is relied upon as proof of the Hastings inventorship and use, under a doctrine summarized by Walker on Patents, Sixth Ed. Sec. 98, p. 123, as follows:

> "Sec. 98. When there is evidence that he who made and abandoned an application for a patent, made also some effort to carry his invention into practical use, then that application is admissible in evidence to aid the court to determine the date and the nature of the invention which was sought to be embodied in a working form."

The Second C. C. A. in the comparatively recent decision in the case of *U. S. Blind Stitch Mach. Corporation v. Reliable Mach. Works, Inc.*, 67 F. (2) 327, Nov. 6, 1933, held:

> "Alleged infringer of patent could rely on drawings specifically described in specification of prior application for patent covering similar machine to show anticipation." (Syllabus 2.)

The drawings relied on in that case were part of an abandoned application but the Court went on to say:

> "We think that claims 1 and 2 are anticipated by the Pomeranz previous application, which was filed June 20, 1925. That petition for a patent provided for an improvement in a machine for fur electrifying, ironing and uncurling. The invention is established by the testimony of the inventor, his patent draftsmen and attorney, *as well as by documentary proof, to-wit, the abandoned application and original drawing. * * * We think the appellee may securely rely on Pomeranz's drawings which are specifically described in his specifications*" (p. 328).

The filing of the Hastings application is a constructive reduction to practice. *Lemley v. Dobson-Evans Co.,*

243 F. 391 (6th C. C. A.), affirmed in *Alexander Milburn Company v. Davis-Bournonville Co.*, 270 U. S. 390 (2nd C. C. A., reversed.)

Therefore, the Hastings application is a constructive reduction to practice, corroborating proof not only of the actual reduction to practice by Hastings but also in its own right a constructive reduction to practice. It is proof of prior inventorship under Subdiv. 4, Sec. 4920 R. S. as evidence that the patentee Smith "was not the original or first inventor, or discoverer" of the incubator patented. *Sundh v. Interborough*, 198 F. 94, 96-7.

We have set forth above a review of part of the evidence which was reviewed also for the consideration of the Second C. C. A. Our purpose in giving this summary of the prior use evidence is to show the contrast of the proof in these cases of respondents, with that in the Sixth and Third Circuit cases relied on by petitioner. *Again, we have the same situation of vastly different records that operated in the Rubber Tire cases to defeat the several certiorari petitions there considered and denied.*

Section IV

Unreported District Court Cases Which Never Reached Any of the Courts of Appeals, Are Improprely in Petitioner's Brief

But as District Court's rulings do not afford an admissible basis for raising the question of conflict of opinions on certiorari petitions, petitioner should not have thus burdened this Court with contentions based on such cases.

We shall, in obedience to this Court's practice, ignore this incompetent material. We are taking the liberty, however, of placing in our Appendix such observations as may serve as a memorandum should this Court desire any information pertaining to those matters.

Section V

The constant recurrences in petitioner's brief of wholly incorrect statements, we feel should be called to this Court's attention.

Top of page 16, they state that the proofs of Hastings' defense in the present cases are "substantially the same" as the proofs in the Wolf and Cooley cases. We believe our discussion supra of the new evidence answers this statement. And the Second C. C. A. specifically made this finding in its decision now under review:

> "This is the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated." (P. ix, our Appendix.)

At page 20, in black-faced type, they say the decision of the Second C. C. A. is in "conflict with the decisions of other Courts *on essentially the same records.*". The first answer to this is that the Court of Appeals for the Second Circuit has found to the contrary as to the testimony in other cases. We think this Second C. C. A. finding is of higher evidential value than this partisan statement to the contrary in petitioner's brief. And we too have distinguished the Wolf and Cooley cases from the James and Elmira case as to the proofs concerning the Hastings prior use, in Section II, page 6, supra.

At page 22, they assert "Staged incubation is not in any way described in the specification [Hastings] has filed, nor is it definitely indicated in any other way contemporaneous with the Davis incubator." These statements do not rise to the dignity of a fact. In Hastings original specification he states:

> "The part of my apparatus that is new, and which has not before been used in connection with hatching devices, is that of the fan, and this I maintain to be of distinct utility in securing uniform ventilation and **an even temperature** throughout all parts of the hatching chamber."

He must have contemplated eggs of different ages in stage incubation because that is the only source of uneven temperature which he was trying to overcome by the use of a fan to make an even temperature. As eggs of different ages have different temperatures, they cause uneven temperature, which is overcome by the use of air circulation to convey the heat from the hotter eggs to the cooler eggs to produce what Hastings says is "an even temperature throughout all parts of the hatching chamber."

Further answer is found at Rec. 1047, Vol. III, and also opposite page 33 of this brief, where Hastings' 1911 patent application drawing is reproduced, and which drawing was witnessed by "Walter B. Davis," the very Davis for whom Hastings built the Brooklyn incubator proved in this James and Elmira record, and in the Hall record, more fully in the latter, and this patent application of 1911 is also witnessed by "Isabel E. Carkhuff," now Mrs. Walter B. Davis. The installation of the Hastings incubator for Davis was in 1910 (Rec. 719). Hastings application was filed May 3, 1911 (Rec. 1011, Vol. III). *Here is record evidence substantially contemporaneous with the record date proved for the making of the Davis incubator.* Note the course of the arrows showing the direction of the air movements circuitously around and around, as shown in the Hastings application drawing reproduced at page 33, this brief, and at Rec. 1047, Vol. III.

The Hastings specification filed in the Patent Office May 3, 1911, contains important statements, as seen quoted at pages 33 and 34, supra.

As to the statement at page 22 of petitioner's brief that no stage incubation is disclosed by Hastings in his specification, we call the Court's attention to the claim prepared May 24, 1912, by Mr. Melville Church, as coun-

sel for Hastings, for purposes of appeal. That claim reads:

> "A hatchery for eggs embodying *an incubating chamber adapted for the reception of superposed trays for eggs to be incubated, whereby said eggs will be arranged in layers one above the other*, means for effecting a distribution of air uniformly to the eggs in the chamber, * * and mechanically operated means for forcing a uniform circulation of air through all parts of the chamber and past the heater, * * and the eggs subjected to the influence of air of the same temperature and composition." (Rec. 1026, Vol. III.)

Then in support of this claim Mr. Church made these statements, among others, concerning stage incubation:

> "Applicant's invention, on the other hand, provides a means whereby success is practically assured, * * and such success is believed to be due to the fact that, he has by a painstaking and very costly series of experiments discovered that the temperature and gaseous stratification in the incubating chamber must be overcome by a mechanically forced circulation of the air * * *and this forced circulation must be such as to overcome the counteracting influence of the eggs upon the air when said eggs are in the different stages of incubation. This feature has seemingly never been effectually worked out by investigators along this line prior to applicant, and it seems to the attorneys to present all of the characteristics of a patentable invention of the highest order."* (Rec. 1027, Vol. III.)

And the Second C. C. A. definitely found (Opinion, Appendix pp. iv, v) stage incubation by Hastings stated in the prior publication "Poultry Culture" (published February, 1912, Defendants' Exhibit 23, Rec. 1405-6, Vol. III). The "Poultry Culture" article stated:

"While this provision for varying the air temperature at different stages of incubtion is requisite to careful work, it is not as necessary with the forced draft hatchery as with dead air incubators, because the moving air adds to or removes heat from the eggs with great rapidity. Because of this fact, eggs at all stages can be placed in the same trays of the Hastings hatchery with little or no injury. Mr. Hastings hatched several thousand eggs under such conditions in his Brooklyn plant last year. This point, while upsetting a tradition, is of no practical significance because eggs of different ages should be kept apart as a matter of general convenience." (Rec. 1406.)

In Hastings book entitled "The Dollar Hen" (Respondents' Exhibit 13), he refers to stage incubation in this passage on page 104:

"At hatching time the eggs are spread out in trays in a special hatching room, which is only large enough to accommodate chicks in the amount of one-sixth of the incubator capacity, *for twice a week deliverings*, or one-third if weekly deliveries are desired."

To get weekly deliveries of chicks he put the eggs in the incubator at different times. For "twice a week deliverings" he partially filled the incubator to get the first of these weekly deliveries of chicks, and for the second delivery of chicks he put other eggs in the incubator half a week later. Or if he wanted deliveries three times a week, *he put eggs in the incubator three times a week*. Thus in any case, he had stage incubation, because the hatches were in "stages," one after another. As the period of embryo incubation is 17½ days (or between 17 and 18 days), the inflexible time fixed by nature, and as the hatching time is 21 days, also fixed by nature, each setting of eggs in the incubator would mark the time (a)

when the embryo would be incubated, and would likewise mark the time (b) when the full creature would be developed and hatched.

In these circumstances, when you put in your first setting you get your chicks on the 21st day thereafter, and then for your next delivery, say later during the same week, you would get your chicks 21 days from that later second setting. And all of this is known in poultry culture, and all of this is expressed in the short term "stage incubation" used in the opinion of this Court in the Snow case.

And now referring to the Hastings testimony in this James case, as to forced drafts and stage incubation, he testified:

> "The idea [in the Third C. C. A. opinion] that the air was blown into the chamber and allowed to escape where it would, is incorrect. *By far the major portion of such air flow was in both cases returned and recirculated through and by the fans.* The exception to this is the necessary relatively small fraction of the air flow or exchange of air which in both incubators was provided for to allow of new oxygen and the escape of carbon dioxide gases." (Rec. 754, Fol. 2262.)
>
> *"Therefore, we used the method of introducing trays of newer or younger eggs, as we call them, in between the trays of older eggs,* to reduce this heating tendency and to equalize the temperature of the eggs at *different stages of incubation,* * *." (Rec. 762, Fol. 2285, Vol. II.)

And this brings us to the finding by the Court of Appeals for the Second Circuit:

> "There is in the record documentary evidence specifically pointing out the fact that staged incubation was embraced in Hastings' idea."

Then the Second C. C. A. quoted from Mr. Church's brief, filed with the Patent Office Examiners-in-Chief, the following:

> "The problem has been to enable the incubating operations to be carried on continuously, if so desired, with eggs at all stages of development." (Appendix, p. vi.)
>
> "When properly adjusted the same blast of air used to heat fresh eggs does equally well for eggs in the advanced *stages* just as the same temperature of the body of the hen incubates the *eggs at all stages* of development * *." (Appendix, p. vi.)

Thus in 1909 when Hastings published "The Dollar Hen," and in 1912 when Mr. Church filed this brief, after his professional association with Mr. Hastings, we have contemporary, dated, printed, published documents showing that Hastings had stage incubation. And then he so testified as stated just above at Rec. 762, Vol. II, Fol. 2285.

On page 20 of their brief, they improperly make it appear that the Hastings incubator built at Mr. Davis' country place was destroyed as it "ended in failure." The testimony is that Mr. Davis met financial embarrassment and gave up his country place, which went to some one else. For that reason they took down the Hastings incubator he had been using because the incubator was built in the room, was attached to the room, and was too large to be taken out of the door. (Rec. Vol. 2, 764.)

At page 20, they also incorrectly made the unsustainable statement that at Muskogee Hastings erected a different incubator from that used at the Davis farm, and that the Muskogee incubator "was also a failure and was destroyed."

The answer to these statements is found in the opinion

of the Second C. C. A. (p. viii of our Appendix) where the Court said:

> "Hastings did not abandon the idea. He promptly took it up on a larger scale at Muskogee, where he built a 30,000 egg plant and embodying the same features. This ran through the hatching seasons of 1912 and 1913. It was similar to the one built for Davis in Brooklyn. * * The principle of a forced draft is conclusively proven, and it appears that Hastings realized that eggs in different stages of incubation could be included in the same closed circuit."

And is further answered at page 30 of this brief, in the first and fourth full paragraphs, and in the last paragraph beginning at the bottom of page 30 and continuing on page 31.

CONCLUSION

The only question here is whether there is conflict of opinion based on like records. Where the records are different the opinions rendered on the respective records are deemed to be correct. That was the case in the Rubber Tire Wheel litigation cited in this brief, Section I, supra. In *Diamond v. Consolidated, 220 U. S. 428, this Court found that the records were different, and, therefore, that the opinions in the Second Circuit and the opinion in the Sixth Circuit were radically different, but that there was no conflict of opinion as each opinion was based on the record it pertained to.*

And exactly this situation is true in these cases now at bar.

It is clearly shown that the opinion and conclusion reached in the Wolf case in the Sixth Circuit and that the opinion and conclusion reached in the Third Circuit, are in accord, respectively, with the proof on which they

were written, while the opinions and conclusions in the Second Circuit are in accord with the definitely different and fuller proofs on which they are correctly founded.

We respectfully beg to submit that petitioner has made no case for the writ of certiorari.

The proof in the James and Elmira case, and that in the Hall case, on which the Court of Appeals for the Second Circuit based its opinions, was, as that Court found to be the fact:

> "* * * the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated.
>
> "On the record now before the Court, it is impossible to agree that Smith's discovery was 'not known or used by others in this country before his invention or discovery thereof.'
>
> "Decree reversed." (Appendix, pp. ix, x.)

And next that there is no conflict of opinion involved in this case because in each former case the opinion or disposition of the case was the result of far different and insufficient proof of the Hastings prior use.

And finally, that no case for certiorari is made on the ground of different or conflicting opinions where the cases are based, as in this case, on far different and unlike evidence.

Respectfully submitted,

H. A. TOULMIN,
H. A. TOULMIN, JR.,
Attorneys for Respondents.

Dayton, Ohio,
May, 1936.

APPENDIX

Opinions of the Court of Appeals for the Second Circuit

The Court wrote one opinion sustaining the Hastings Prior Use and finding the Smith Patent void, as to Claim 1 in the Hall case, and wrote another short opinion in the James and Elmira cases as to Claims 1, 2, 3 and 5. The extended opinion written in the Hall case, the 2nd C. C. A. adopted and applied to the James and Elmira cases by the following language:

> "This suit is for infringement of Claims 1, 2, 3 and 5 of the Smith patent No. 1,262,860, for an incubator granted April 16, 1918, on an application filed October 26, 1916. Claim 1 has been held invalid in *Smith v. Hall,* decided this day. Claims 2 and 3 are similar method claims and fall for the same reasons as Claim 1. With the method claims invalid, there is nothing in claim 5 covering the apparatus to apply the method to support an infringement suit. Decree reversed." (Rec. 1631, Vol. III.)

For the convenience of this Court we reprint in this Appendix the extended opinion in *Smith v. Hall,* referred to above:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL B. SMITH,

Plaintiff-Appellee,

against

A. B. HALL AND L. C. HALL, d. b. a.
HALL BROTHERS,

Defendants-Appellants.

Before: MANTON, SWAN AND CHASE, *Circuit Judges.*

Appeal from the United States District Court for the

District of Connecticut. Suit for infringement of patent. Decree for plaintiff; defendants appeal.

Reversed.

ARTHUR E. PAIGE, Esq.
FRANK E. PAIGE, Esq.
Attorneys for Appellants.

ALBERT L. ELY, Esq.
EDMOND M. BARTHOLOW, Esq.
GEO. C. MCCONNAUGHEY, Esq.
Attorneys for Appellee.

MANTON, *Circuit Judge.*

This suit is for infringement of claim 1* of patent No. 1,262,860 issued April 16, 1918, on an application filed October 26, 1916, for a method for the incubation of eggs. This claim was held valid and infringed in *Smith v. Snow* (294 U. S. 1) and *Waxham v. Smith* (294 U. S. 20). It embraces a method of hatching which makes it possible to increase the capacity of an incubator to many thousands by the combination of two major steps. Instead of setting the entire capacity of an egg chamber at one time, the inventor proposed to fill the chamber with successive settings, preferably three or four days apart, so that when the chamber was filled it contained eggs in different stages of incubation, some in the endothermic phase and some in the exothermic phase. Smith propelled a strong draft of properly heated air over the eggs

*Claim 1 reads: "The method of hatching a plurality of eggs by arranging them at different levels in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture and applying a current of heated air, said current being created by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature, whereby the air will be vitalized, the moisture conserved and the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified."

thus set in staged incubation "with sufficient velocity to circulate, diffuse, and maintain the air throughout the chamber at substantially the same temperature." In this way, the heat generating property of the further advanced eggs is offset by the heat absorbing properties of the less advanced eggs so that there is a continuous tendency to equalize the temperature throughout the cabinet at approximately the temperature of the introduced current of air.

However, this record differs from those before the Supreme Court in *Smith v. Snow* and *Waxham v. Smith* (supra) for here appellants have offered evidence of prior public use of the patented method and knowledge thereof by Milo Hastings. He had been a poultryman for the Department of Agriculture in 1908 and 1909, travelling extensively and visiting poultry plants and experimental stations operating incubators. In 1909, the "Dollar Hen," a book written by him was published. Among other things he described there an idea for the plan of construction and operation of a new type hatcher. He said:

> "The eggs are kept in bulk in special cases which are turned as a whole and may rest on either of four sides. At hatching time the eggs are spread out in trays in a special hatching room, which is only large enough to accommodate chicks in the amount of one-sixth of the incubator capacity, for twice a week deliverings or one-third if weekly deliveries are desired.
>
> "There are no pipes or other sources of heat in the egg chambers. All temperature regulation is by means of air heated (or cooled as the case may be) outside of the egg rooms and forced in to the egg rooms by a motor driven cone fan, maintaining a steady current of air, the rate of movement of which may be varied at will. The air movement maintained will always be sufficiently brisk, however, to

prevent an unevenness (sic) of temperature in different parts of the room."

This, it is said, was a disclosure of forced draft and staged incubation in the method of incubating and hatching eggs. It is argued that twice a week and weekly deliveries necessarily contemplate that the eggs in the egg room would have to be of different ages and placed in staged incubation with the forced draft circulation maintaining an even temperature.

In 1910, Hastings built and operated an incubator of 6,000 egg capacity for one Davis of Brooklyn, N. Y., embodying these ideas. Drawings prepared for this trial under Hastings' supervision purport to illustrate this incubator and original photographs with published illustrations and descriptions are in the record. Hastings, Davis and his wife all testified that the apparatus and the method of hatching used in this incubator were such as indubitably to anticipate Smith. There can be no doubt that there was a closet chamber, in which the eggs were arranged in stacks of trays through which a current of heated air was blown by a mechanical fan. *The* questioned point is whether or not staged incubation was used and known there.* Hastings specifically testified that it was. Davis and his wife both testified that eggs were put in the chambers as they came in, once or twice a week. We should be unwilling to accept this oral testimony if it were uncorroborated. See, Barbed Wire Patent Case, 143 U. S. 275,284; *Deering v. Winone*, 155 U. S. 286,301; *General Motors Corp. v. Leer Auto Supply Co.*, 60 Fed. [2] 904 (C. C. A. 2). But the necessary support is present here. An article in Poultry Culture, describing the later operations of Hastings at Muskogee, said: "* * * the moving air adds to or removes heat from the eggs with great rapidity. Be-

* All italics in quotations in this Appendix are ours.

cause of this fact, eggs at all stages can be placed in the same trays of the Hastings Hatchery with little or no injury. Mr. Hastings hatched several thousand eggs under such conditions in his Brooklyn (Davis) plant last year." This was published before any motive for so declaring could be possible. Further indication that staged incubation was used at the Davis plant is taken from the Hastings' application for a patent, and the file wrapper relating to it. This application No. 624,885 was filed May 3, 1911. *It was designed to embody the invention practiced by Hastings at the Davis plant,* and is witnessed by Mr. Davis and Isabel Carkhuff, the present Mrs. Davis. The drawing of the apparatus shows an undivided egg chamber down through which air is driven by a fan so that it circulates through a source of heat and then is drawn through the back of the fan and again started on its circuit. There are no separate chambers shown and in his application Hastings makes no mention of any way of providing separate chambers with different temperatures. In view of Hastings' avowed intention of incubating large numbers of eggs at the same time, and his substantial declarations that he did have the incubator at Brooklyn operating with two thousand eggs in it, he must have had eggs of varying stages of incubation there, since it is clear that the eggs were supplied in relatively small amounts. There is in the record documentary evidence specifically pointing out the fact that staged incubation was embraced in Hastings' idea. His original application was undirected by counsel. When he met with difficulties in putting the patent through, he employed attorneys whose brief on the appeal to the three Examiners in Chief contained the following:*

---

*This brief was prepared and signed by the late Mr. Melville Church.

"The problem has been to enable the incubating operations to be carried on continuously, if so desired, with *eggs at all stages* of development, and with all of a vast number of eggs subjected to the same temperature and atmospheric conditions best adapted for the development of the embryo. * * The simple way in which applicant overcame the difficulty was through the provision of a mechanically operated air forcing means which would force a rapid circulation of air through the whole collection of eggs in the chamber and past the heater. The mechanical air forcing means is an essential factor; if heat is to be conserved and the conditions maintained uniform; for a circulation, which is due to differences in temperature in different portions of the circulatory system, as, for example, where the air is circulated by the effect of the heater in causing the heated air to rise and pass into or through the incubating chamber, will not answer for large collections of eggs. * * * In the Hastings hatchery, a current of air is blown past each and every egg at the rate of thirty feet per minute and this rapidly moving air quickly bringing the temperature of the egg to approximately that of the air. *This method of heating keeps the temperature of the eggs in the advanced state of incubation down within a few degrees of that of the air,* the exact difference being regulated at will by adjusting the speed of the fan. *When properly adjusted the same blast of air used to heat fresh eggs does equally well for eggs in the advanced stages just as the same temperature of the body of the hen incubates the eggs at all stages of development, without recourse on the hen's part to the 'hatching fever', erroneously supposed to explain the higher temperature of eggs at a more advanced stage of development.* Owing to this fact eggs at all stages may be handled simultaneously with uniformly good results. * * The operator of a Mechanical Draft plant may switch as much 'fresh' or outdoor air into this inner circulation as he is willing to

> heat. The inventor's practice is to use but a small portion of outdoor air except in cases of excessive humidity, when a large exchange of air is utilized as a simplest means of increasing evaporation. * * The introduction of moisture from the mist spray nozzles in the fan boxes to increase hur idity, or running in outside air to decrease it as indicated by egg weights or air cell shrinkage is sufficient for ordinary hatching practice."

The application for a patent was denied by two of the examiners, with one dissenting. Without funds he pursued his application no further.

There can be no question that the quoted language expressed the idea later patented by Smith. The argument that "eggs in different stages may be handled simultaneously" certainly came from the inventor and not the attorneys. Although this specific point is not made in the original application filed by Hastings, his first specification was: "My invention is that of a hatchery in which I secure better ventilation and a more uniform temperature throughout the hatching chamber by substituting a forced draft for gravity drafts." In view of his avowed aim of continuous hatching in great numbers, there is implicit the idea that the eggs will not be in the same stages. And the application and file-wrapper make no mention of different chambers in which eggs of equal maturity would be placed, with the consequent necessity of adjusting the temperature of the air current to the varying requirements of the different stages. In fact, he mentions "uniform ventilation and an even temperature throughout all parts of the hatching chamber." We think the attorney's brief does not represent a new idea but a clarification of an old one.

An abandoned application can be used to clarify the character of a claimed prior use. *Interurban Ry. & c. Co.*

v. Westinghouse El. & Mfg. Co., 186 Fed. 166 (C. C. A. 6) although alone it might not be acceptable to establish prior use. cf. *Wright Co. v. Herring-Curtiss Co.*, 177 Fed. 257 (C. C. N. Y. 1910).

There is *uncontradicted testimony* that this *Davis hatchery* was an operative success. It was in use during the hatching seasons of 1910 and 1911. Its discontinuance is explained by the sponsor's financial reverses and its destruction by the fact that it was built within the cellar of the leased farmhouse which Davis had to leave.

Hastings did not abandon the idea. He promptly took it up on a *larger scale* at Muskogee, where he built a 30,000 egg plant and embodying the same features. This ran through the hatching seasons of 1912 and 1913. It was similar to the one built for Davis in Brooklyn. *Photographs of it were taken at the time of its use; articles which appeared in newspapers and technical publications, with photographs of the incubator, are in the record.* The principle of a forced draft is conclusively proven, and it appears that Hastings realized that eggs in different stages of incubation could be included in the same closed circuit. Drawings of this incubator were produced and received in evidence. That this incubator used a forced draft for the distribution of heat to maintain equal temperature throughout all the eggs in the seven separate incubating chambers, is clearly shown. In these chambers, the air which entered at the time was driven by the forced draft vertically, down towards the egg trays and was returned by the open space beneath the trays, to the fan or blower from which the circuit passed the heat or continued on a complete continuous circuit. The drawing represents the machine as described in several articles with photographic illustrations. The electrical contractor who installed the fans and electrical controls testified. A photograph of the

motor driven blower in the incubator and the description appeared in the Electrical World of July 6, 1912. That description disclosed the use of a motor-driven blower to force evenly heated air to all parts of the tray racks.

An album of original photographs of the motor-driven blower and the superimposed egg trays which slide in the incubator chambers are shown. The practice of the method of Smith's patent is testified to by witnesses who saw the plant operated and who participated in its operation during the two hatching seasons.

In this operation, Hastings testified that the principle of staged incubation along *with forced draft circulation was used.*

Although the patent has been held valid in a number of cases, *only two Circuit Courts have considered Hastings.* In a prior litigation (*Buckeye v. Wolf*, 291 Fed. 253 [N. D. O.], affd. 296 Fed. 680 [C. C. A. 6]) there was introduced the publication in The Dollar Hen and other publications as well as the Hastings' applications and there it was found that these did not describe an anticipation of Smith's method. *While the patent application is referred to, no mention is made of the brief of Hastings' patent attorneys. Hastings was not a witness nor was any witness called to testify to what his prior use had been.* In *Buckeye v. Cooley* (17 Fed. [2] 453) *the same evidence was in the record and Hastings was a witness, but the Third Circuit found his testimony unconvincing and that alleged prior uses were not of Smith's method because they did not provide for a regular current of air. This is the first time the prior uses at the Davis place and at Muskogee have been so fully presented and substantiated.*

On the record now before the court, it is impossible to agree that Smith's discovery was "not known or used by

others in this country before his invention or discovery thereof."

Decree reversed.

District Court Stone Case: Hastings Not a Witness: Only a Master's Report is Produced (P..ix, Appendix to Certiorari Petition) No Court Opinion

At page 13 of their brief they state, that certain depositions, allegedly taken from the Stone case, were "stipulated" into this James case. That is a misstatement. Counsel for Petitioner had certified copies alleged to be of depositions as to the Hastings prior use taken from the Stone case. He attempted to offer them in evidence (Rec. 899, Vol. II). Counsel for James instantly objected, saying:

> "This testimony is objected to on behalf of the defendants as being secondary evidence, and incompetent, and irrelevant, and having no place in the trial of any of the issues involved in this case."

Of the seven witnesses of the Hastings prior use before the Second C. C. A. only two of them testified in the Stone case. *Mr. Hastings* (Rec. 716) *did not testify in the Stone case;* and the witnesses Hickox (Rec. 831), Peabody (Rec. 851), Brewer (Rec. 905) and Campbell (Rec. 911) *did not testify in the Stone case. Without Mr. Hastings no sufficient and complete testimony could be produced.**

Smith v. Sims: Only District Court: No Opinion: Only Findings and Conclusions: No Mention of Hastings Prior Use

It is pretended (p. 13, Petitioner's Brief) that the testimony in support of the Hastings prior use was dis-

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* If this Court desires to examine the testimony of Mr. Hastings as to the Master's report in the Stone case, please see Rec. 760-1, Fols. 2278-82, Vol. II.

posed of adversely in *Smith v. Sims*. In the first place, the present counsel for James and Elmira were counsel for Sims in the case before Judge Baltzell up to and after the time when Judge Baltzell decided against Sims. These counsel then, for reasons not pertinent here, retired from that case by the leave of Judge Baltzell.

It is true that the depositions in support of the Hastings prior use were filed in the Sims suit, but Judge Baltzell never passed upon that defense. On the argument, Judge Baltzell announced that he had previously concluded to decide in favor of the defendant Sims; but that when he read this Court's opinions in the two Snow and Waxham cases, he felt constrained to sustain the Smith patent. *And in his findings of fact and conclusions of law, in the Sims case, no mention is made of the Hastings prior use defense—nothing is said about that defense.* Nor did Judge Baltzell make any mention of the Hastings prior use in the decree he entered. (Plaintiff's Exhibit 2, Book of Decisions.) And Judge Baltzell wrote no opinion in this Sims case.

Therefore, there was never any adjudication by the District Court in Indiana (and for that matter in any other Court) that the Hastings prior use was established in accordance with law; and that the Hastings invention, in incubators tested and used commercially, was an anticipation of the Smith invention, until the opinions here in question pronounced by the Court of Appeals for the Second Circuit in unanimous opinions.

Street Case—Only District Court: Opinion Unreported: Opinion Not Produced in James Record: Advised Opinion in Hall Record

At page 14 of their Brief they discuss an opinion by Judge Molyneaux and state that he had before him the same evidence of the Hastings prior use that is in the James and Elmira cases.

But any contention about that unproduced opinion is, we understand, without value because it was only a District Court opinion which is not in the practice of this high Court regarded as a basis for establishing an alleged conflict of opinion, and we understand that this rule is particularly applicable when the petitioner seeks to bring up by certiorari a case decided by one of the ten Circuit Courts of Appeals.

The King v. Smith: Canadian Court: Complete Opinion Not Produced, Only Extracts (P. 15, Petitioner's Brief)

If this foreign opinion were competent on the issue of conflict of opinions between U. S. Circuit Courts of Appeals, then this Court would require a complete copy of this Canadian opinion. Mere extracts, such as Petitioner admits he has produced, we deem to be insufficient. And even if this Court had such a copy, there would be left the anomaly of this petitioner endeavoring to have this Court compare an opinion of a foreign court with the opinion of an American Court, and then to decide which is correct.

We submit that our diplomatic relations with other nations have not progressed to that stage.